

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AZEEM MODAK,

Plaintiff,

v.

ALARIS COMPANIES, LLC;
FRONTIER DRILLING USA, INC.,

Defendants.

No. C 08-5118 CW

ORDER DENYING
DEFENDANTS'
MOTION TO DISMISS
AND TRANSFERRING
CASE

_____ /

Defendants Frontier Drilling USA, Inc. (Frontier) and Alaris Companies, LLC (Alaris), relying on Federal Rule of Civil Procedure 12(b)(3), move to dismiss this action based on improper venue. In the alternative, relying on 28 U.S.C. § 1404(a), Defendants move to transfer venue to the Southern District of Texas for the convenience of parties and witnesses. Plaintiff Azeem Modak opposes these motions. Having considered the parties' papers, the Court DENIES Defendants' motion to dismiss. For the reasons stated below, the Court transfers this action to the Southern District of Texas.

BACKGROUND

Plaintiff, a resident of Bothell, Washington, worked as a crew member aboard the Frontier Discoverer, a vessel owned by Defendant Frontier. Plaintiff alleges that on or about October 1, 2007 he suffered physical injuries while working aboard the Frontier

1 Discoverer in Alaskan waters. Plaintiff received medical treatment
2 for his injuries in Alaska and Washington. At the time of his
3 injuries, Plaintiff alleges, he was employed by Defendants Frontier
4 and Alaris.

5 On November 10, 2008, Plaintiff filed this action against
6 Defendants in the Northern District of California. Plaintiff
7 claims negligence under the Jones Act,¹ 46 U.S.C. § 30104, and,
8 under general maritime law, 28 U.S.C. § 1333(1), he claims
9 unseaworthiness,² maintenance and cure,³ and attorneys' fees and
10 costs. Plaintiff has no connection with the Northern District of
11 California and none of the events which gave rise to his claims
12 occurred here.

13 Frontier is a Norwegian company in the business of supplying
14 on- and off-shore drilling and production services for customers in
15 the oil industry. Frontier maintains administrative offices in
16 Houston, Texas, within the Southern District of Texas. It claims
17 that it conducts no business in the state of California. Alaris is
18 a United States-based company in the business of providing ship
19 management, maritime staffing, vessel crewing, marine engineering,
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21 ¹The Jones Act provides for an in personam action for a seaman
22 who suffers injury in the course of employment due to negligence of
23 his employer, the vessel owner, or crew. Lewis v. Lewis & Clark
Marine, Inc., 531 U.S. 438, 441 (2001).

24 ²"Unseaworthiness" is a claim under general maritime law based
25 on the employer's duty to ensure that the vessel is reasonably fit
to be at sea. Lewis, 531 U.S. at 441.

26 ³A claim for maintenance and cure addresses the employer's
27 obligation to provide food, lodging, and medical services to a
seaman injured while serving on the vessel. Lewis, 531 U.S. at
28 441.

1 and project management services to customers in the maritime
2 industry, including Frontier. Its offices are located in Petaluma,
3 California. Alaris has routine business contacts within the
4 Southern District of Texas.

5 According to Defendants, three key witnesses, who were working
6 on the Frontier Discoverer when Plaintiff allegedly suffered his
7 injuries, live in or near the Southern District of Texas. Def.s'
8 Ex. B, Souza Aff. at 1. Defendants claim that each of these
9 individuals spoke to and observed Plaintiff before and after his
10 alleged injuries. Id.

11 LEGAL STANDARD

12 A defendant may raise a Rule 12(b)(3) motion to dismiss for
13 improper venue in its first responsive pleading or by a separate
14 pre-answer motion. Fed. R. Civ. P. 12(b)(3). Once the defendant
15 challenges venue, the plaintiff bears the burden of establishing
16 that venue is proper. Piedmont Label Co. v. Sun Garden Packing
17 Co., 598 F.2d 491, 496 (9th Cir. 1979).

18 When considering a Rule 12(b)(3) motion to dismiss, the
19 pleadings need not be accepted as true, and the court "may consider
20 facts outside of the pleadings." Richardson v. Lloyd's of London,
21 135 F.3d 1289, 1292 (9th Cir. 1998). If the court determines that
22 venue is improper, it may dismiss the case, or, if it is in the
23 interest of justice, transfer it to any district in which it
24 properly could have been brought. 28 U.S.C. § 1406(a); Dist. No.
25 1, Pac. Coast Dist. v. Ala., 682 F.2d 797, 799 (9th Cir. 1982).
26 Even if the court determines that venue is proper, it may still
27 transfer for the convenience of parties and witnesses, in the
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1 interest of justice. 28 U.S.C. § 1404(a). In either case, the
2 decision to transfer rests in the discretion of the court.
3 28 U.S.C. § 1404(b); King v. Russell, 963 F.2d 1301, 1304 (9th Cir.
4 1992)(holding that the trial court did not abuse its discretion
5 under 28 U.S.C. § 1406(a) when it chose to dismiss, and not
6 transfer, the action because of improper venue).

7 DISCUSSION

8 I. Improper Venue

9 Defendants claim that venue is improper under the rules of the
10 general venue statute, 28 U.S.C. § 1391(b). Plaintiff, however,
11 asserts jurisdiction under the Jones Act and general maritime law.
12 Therefore, venue is analyzed under the three bodies of law.

13 A. Jones Act Venue

14 Under the Jones Act, a seaman may bring a federal cause of
15 action against his or her employer for physical injuries suffered
16 during the course of employment. 46 U.S.C. § 30104. Until
17 recently, the Jones Act contained an independent venue provision
18 that allowed venue only "in the judicial district in which the
19 employer resides or the employer's principal office is located."
20 46 U.S.C. 30104(b) repealed by Pub. L. No. 110-181, § 3531, 122
21 Stat.3 (2008). According to the House of Representatives committee
22 that proposed the repeal,

23 This subsection is being repealed to make clearer that
24 the prior law regarding venue, including the holding of
25 Pure Oil Co. v. Suarez, 384 U.S. 202 . . . (1966) and
cases following it, remains in effect, so that the
action may be brought wherever the seaman's employer
does business.

26 H.R. Rep. No. 110-437, § 3 (2008).
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1 In Pure Oil, the Supreme Court held that venue for a seaman's
2 Jones Act claim could be maintained under general venue statute
3 28 U.S.C. § 1391(c), pursuant to which the defendant corporation
4 could be sued in any district in which it transacted business, even
5 though the Jones Act had its own, more restrictive, venue
6 provision. 384 U.S. at 207. In Go-Video, Inc. v. Akai Elec. Co.,
7 Ltd., the Ninth Circuit interpreted the Pure Oil holding as
8 standing for the broader principle that the general venue statute
9 applies across the board absent clear Congressional intent to the
10 contrary. 885 F.2d 1406, 1409 (9th Cir. 1989). Therefore, under
11 Pure Oil and Go-Video, Inc., the general venue statute applies to
12 Plaintiff's Jones Act claim.

13 B. General Venue Statute

14 Defendants correctly assert that venue is improper under the
15 general venue statute, 28 U.S.C. § 1391(b). Because Plaintiff's
16 action arises under the Jones Act and general maritime law,
17 jurisdiction is not based on diversity of citizenship, and
18 28 U.S.C. § 1391(b) provides the appropriate framework. Pursuant
19 to 28 U.S.C. § 1391(b):

20 A civil action wherein jurisdiction is not founded solely
21 on diversity of citizenship may, except as otherwise
22 provided by law, be brought only in (1) a judicial
23 district where any defendant resides, if all defendants
24 reside in the same State, (2) a judicial district in which
25 a substantial part of the events or omissions giving rise
26 to the claim occurred, or a substantial part of property
27 that is the subject of the action is situated, or (3) a
28 judicial district in which any defendant may be found, if
there is no district in which the action may otherwise be
brought.

26 1. Residence

27 Venue does not lie in this district under 28 U.S.C.

1 § 1391(b)(1) because although Alaris has sufficient contacts with
2 and, therefore, "resides" in California, Frontier does not. For
3 the purposes of the general venue statute, corporations are deemed
4 to reside in any judicial district in which they are subject to
5 personal jurisdiction at the time the action commenced. 28 U.S.C.
6 § 1391(c).

7 There are two independent limitations on a court's power to
8 exercise personal jurisdiction over a non-resident defendant: the
9 applicable state personal jurisdiction rule and constitutional
10 principles of due process. Sher v. Johnson, 911 F.2d 1357, 1361
11 (9th Cir. 1990); Data Disc, Inc. v. Systems Technology Associates,
12 Inc., 557 F.2d 1280, 1286 (9th Cir. 1977). California's
13 jurisdictional statute is co-extensive with federal due process
14 requirements; therefore, jurisdictional inquiries under state law
15 and federal due process standards merge into one analysis. Rano v.
16 Sipa Press, Inc., 987 F.2d 580, 587 (9th Cir. 1993).

17 The exercise of jurisdiction over a non-resident defendant
18 violates the protections created by the due process clause unless
19 the defendant has "minimum contacts" with the forum state so that
20 the exercise of jurisdiction "does not offend traditional notions
21 of fair play and substantial justice." International Shoe Co. v.
22 Washington, 326 U.S. 310, 316 (1945). Personal jurisdiction may be
23 either general or specific.

24 General jurisdiction exists where the defendant's contacts
25 with the forum state are so substantial or continuous and
26 systematic that jurisdiction exists even if the cause of action is
27 unrelated to those contacts. Bancroft & Masters, Inc. v. Augusta
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1 Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000). The standard for
2 establishing general jurisdiction is "fairly high." Id.; Brand v.
3 Menlove Dodge, 796 F.2d 1070, 1073 (9th Cir. 1986). The
4 defendant's contacts must approximate physical presence in the
5 forum state. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d
6 797, 801 (9th Cir. 2004). Factors considered in evaluating the
7 extent of contacts include whether the defendant makes sales,
8 solicits or engages in business, designates an agent for service of
9 process, holds a license, or is incorporated in the forum state.
10 Bancroft & Masters, Inc., 223 F.3d at 1086.

11 Specific jurisdiction exists where the cause of action arises
12 out of or relates to the defendant's activities within the forum.
13 Data Disc, Inc., 557 F.2d at 1286. Specific jurisdiction is
14 analyzed using a three-prong test: (1) the non-resident defendant
15 must purposefully direct its activities or consummate some
16 transaction with the forum or a resident thereof, or perform some
17 act by which it purposefully avails itself of the privilege of
18 conducting activities in the forum, thereby invoking the benefits
19 and protections of its laws; (2) the claim must be one which arises
20 out of or results from the defendant's forum-related activities;
21 and (3) the exercise of jurisdiction must be reasonable. Lake v.
22 Lake, 817 F.2d 1416, 1421 (9th Cir. 1987). Each of these
23 conditions is required for asserting jurisdiction. Insurance Co.
24 of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir.
25 1981).

26 A showing that a defendant "purposefully availed" itself of
27 the privilege of doing business in a forum state typically consists
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1 of evidence of the defendant's actions in the forum, such as
2 executing or performing a contract there. Schwarzenegger, 374 F.3d
3 at 802. The requirement of purposeful availment ensures that the
4 defendant should reasonably anticipate being haled into the forum
5 state court based on its contacts. World-Wide Volkswagen Corp. v.
6 Woodson, 444 U.S. 286, 297 (1980). The purposeful availment test
7 is met if "the defendant has taken deliberate action within the
8 forum state or if he has created continuing obligations to forum
9 residents." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995).

10 Defendants concede that Alaris' offices are located in
11 Petaluma, within the Northern District of California. Def.s' Ex.
12 C, Wolff Aff. Thus, Alaris resides in this district.

13 However, Defendants allege that Frontier has no contacts with
14 either this district or California. Def.s' Ex. B, Souza Aff. at 1.
15 In his response, Plaintiff provides no evidence to contradict this
16 allegation. Further, Plaintiff argues neither general nor specific
17 jurisdiction. Instead, he contends that jurisdiction in the
18 Northern District of California is proper because it can be
19 reasonably inferred that Frontier does business here. Plaintiff's
20 claims are not persuasive.

21 a. Contractual Relations

22 First, Plaintiff asserts that the Court's jurisdiction over
23 Frontier is properly based on Defendants' "contractual relation."
24 The Supreme Court, however, has clearly established that the
25 formation of a contractual relationship with a resident is not, in
26 itself, sufficient to create specific jurisdiction over a non-
27 resident. Id. at 478.

b. Hiring Process

Plaintiff also claims that the Court has jurisdiction over Frontier based on Defendants' "joint participation" in hiring him to work aboard Frontier's vessel. He cites no controlling authority for this proposition. Other federal courts, however, have addressed the issue of how an out-of-state employer's hiring practices can subject it to specific personal jurisdiction in a forum. Potts v. Cameron Offshore Boats, Inc., 401 F. Supp. 2d 733, 737 (S.D. Tex. 2005).

In Potts, the plaintiff, a Texas resident, sued the defendant, an out-of-state corporation, for physical injuries that he sustained while working aboard the defendant's off-shore vessel. Id. at 735. The defendant alleged that it had no business contacts with the forum, but conceded that it had used a Texas recruiter to hire the plaintiff. Id. at 735. The court held that personal jurisdiction was proper because the defendant "must have expected to be haled into court in Texas should a dispute arise in relation to the employment of [Texas] workers." Id. at 737. The court based its holding on the fact that the defendant and its recruiter had an established process through which the defendant regularly hired Texas workers. Id. Among other things, this process included advertising and referral-fee plans through which the defendant hired thirty-one Texas workers, including the plaintiff, over a three-year period. Id.

This case is distinguishable from Potts. Unlike the plaintiff in Potts, Plaintiff here makes no showing that Frontier has any recruiting process in California, established or otherwise. The

1 record contains no employment statistics or other evidence showing
2 the number of workers Frontier contacts or hires from this forum.
3 Lastly, Plaintiff fails to show how such a process or Defendants'
4 "joint participation" resulted in his hiring. Without evidence
5 such as this, the Court cannot find that Frontier's hiring process
6 would subject it to personal jurisdiction in this forum.

7 c. Defendants' Interaction

8 Plaintiff claims that the Court has personal jurisdiction over
9 Frontier based on its "interaction" with Alaris. Plaintiff,
10 however, fails to define such interaction or to distinguish it from
11 Defendants' contractual relationship or hiring practices, neither
12 of which justify personal jurisdiction over Frontier. The Court
13 cannot find that personal jurisdiction over Frontier is proper
14 based solely on Plaintiff's claim that Frontier interacts with
15 Alaris.

16 d. Internet Contacts

17 Plaintiff claims that the Court has jurisdiction over Frontier
18 because "Frontier advertises in California, on the internet, for
19 employees." In support of his claim, Plaintiff provides a print-
20 out copy of Frontier's "Employment" website. Pl.'s Dec., Ex. 6.
21 The website contains general information about off-shore and
22 corporate employment opportunities, as well as hyperlinks that
23 prospective employees can use to fill out and submit resumes and
24 online employment applications. Neither California, nor any other
25 state, is mentioned on the website.

26 The Ninth Circuit addressed personal jurisdiction in the
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1 context of internet-only contacts in Cybersell, Inc. v. Cybersell,
2 Inc., 130 F.3d 414, 415 (9th Cir. 1997). The plaintiff, an Arizona
3 corporation, sued the defendant, a Florida corporation, in the
4 District of Arizona for allegedly infringing on the plaintiff's
5 service mark. Id. The defendant provided general business
6 services over the internet, and had a website which contained a
7 hyperlink allowing internet users to sign up, list their addresses,
8 and indicate interest in its business services. Id. at 415-16.
9 The plaintiff claimed that specific jurisdiction was proper in any
10 jurisdiction, including Arizona, because the alleged infringement
11 occurred on the defendant's website, which could be accessed from
12 anywhere. Id. at 416.

13 The Cybersell court applied a sliding scale analysis under
14 which jurisdiction is directly proportionate to the nature and
15 quality of the defendant's commercial activity conducted through
16 the internet. Id. at 419. The court found that the defendant
17 conducted no commercial activity over the internet in the forum and
18 did nothing to encourage people in the forum to access its website.
19 Id. at 419-20. Despite the defendant's website's seemingly
20 interactive qualities, the Cybersell court concluded that the
21 website was essentially "passive" and therefore specific personal
22 jurisdiction was not proper because the defendant had not
23 purposefully availed itself of the forum. Id.

24 Here, Frontier's website is more passive than the website at
25 issue in Cybersell. Frontier's website provides only general
26 information about its services and employment opportunities. Like
27 the website in Cybersell, Frontier's website provides a hyperlink
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1 through which internet users can transmit personal information to
2 it. But, unlike the defendant there, Frontier does not provide
3 business services over the internet. Furthermore, Plaintiff makes
4 no showing that Frontier's website specifically targets prospective
5 employees in the Northern District of California. Therefore,
6 Frontier's website does not provide a basis for personal
7 jurisdiction.

8 e. Sweeping Nature of Business

9 Lastly, Plaintiff seems to claim that jurisdiction is proper
10 based on "the sweeping nature of [Frontier's] business." He makes
11 general references to vendors, joint ventures and assets that
12 Frontier has in California, but offers no evidence. Absent a
13 factual showing of such contacts, this is not a proper basis for
14 personal jurisdiction.

15 2. Events Giving Rise To Claim

16 Venue does not lie under 28 U.S.C. § 1391(b)(2) because all
17 events or omissions giving rise to Plaintiff's claim occurred
18 outside the Northern District of California. Plaintiff suffered
19 his alleged injuries onboard the Frontier Discoverer while in
20 Alaskan waters, and he received medical treatment for his injuries
21 in Alaska and Washington. Furthermore, neither the vessel nor any
22 other property that is the subject of this action is situated in
23 the Northern District of California.

24 3. Alternative Fora

25 Lastly, venue does not lie under 28 U.S.C. § 1391(b)(3)
26 because this action may be brought in the Southern District of
27 Texas, to which Defendants seek transfer. Venue is proper in that
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1 forum because both Frontier and Alaris are subject to personal
2 jurisdiction and therefore are deemed to reside there pursuant to
3 28 U.S.C. § 1391(c). In sum, venue in this district is not proper
4 under 28 U.S.C. § 1391(b).

5 C. General Maritime Law

6 Under Rule 82 of the Federal Rules of Civil Procedure,
7 maritime claims are not treated as civil claims for the purposes of
8 the general venue statutes, 28 U.S.C. § 1391-93, and have been
9 traditionally allowed a more generous choice of forum. Pure Oil
10 Co., 384 U.S. at 205. In an in personam maritime claim, venue is
11 proper wherever the defendant can be personally served or where its
12 property or credits can be attached. In re Louisville
13 Underwriters, 134 U.S. 488, 493 (1890).

14 Here, Plaintiff properly invokes the Court's maritime
15 jurisdiction. See 28 U.S.C. § 1333. However, Plaintiff makes no
16 showing that Frontier may be personally served in the Northern
17 District of California through, for example, an agent for service
18 of process. Plaintiff provides no proof of service of process.
19 Further, Plaintiff shows no evidence that Frontier owns property
20 that can properly be attached in this forum. He alleges that
21 Frontier has assets here, but he does not specify what or where
22 these assets are. Based on the absence of such evidence, and on
23 the Court's finding that it does not have personal jurisdiction
24 over Frontier, venue is improper under general maritime law.

25 II. Additional Discovery

26 Plaintiff requests that the Court allow it take discovery on
27 the issue of venue. Citing Laub v. United States, 342 F.3d 1080,

1 1093 (9th Cir. 2003), Plaintiff claims that "it would be an abuse
2 of the Court's discretion to refuse [his] discovery." Plaintiff's
3 argument is unpersuasive.

4 The relevant issue in Laub was whether a court should allow
5 additional discovery to establish personal jurisdiction, not venue.
6 Id. However, in Laub, the court explained that "a refusal to grant
7 discovery to establish jurisdiction is not an abuse of discretion
8 when it is clear that further discovery would not demonstrate facts
9 sufficient to constitute a basis for jurisdiction." Id. at 1093.
10 Because Plaintiff does not make a showing of how discovery could
11 produce facts that would constitute a basis for personal
12 jurisdiction, Laub does not support his request.

13 Furthermore, although "it may be appropriate to hold a Rule
14 12(b)(3) motion in abeyance until the district court holds an
15 evidentiary hearing on disputed facts" if "genuine factual issues
16 are raised," Murphy, 362 at 1139, no such genuine factual issues
17 are raised here. Plaintiff merely argues that it would be
18 reasonable to find that Frontier is doing business in California.
19 Thus, there is no basis to conclude that additional discovery will
20 yield facts sufficient to constitute a basis for jurisdiction and,
21 thereby, venue. Based on the foregoing, the Court denies
22 Plaintiff's request for additional discovery.

23 III. Transfer of Venue

24 Because venue is improper, the Court must dismiss the action,
25 or, in the alternative, may transfer it if it would be in the
26 interests of justice. 28 U.S.C. § 1406(a). Whether transfer is in
27 the interest of justice is a decision that rests within the
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1 discretion of the Court. King, 963 F.2d at 1304. Here, transfer
2 is appropriate because Plaintiff's complaint states a claim which,
3 if proved, would appear to entitle Plaintiff to damages.

4 The Court may transfer this action to any district in which it
5 properly could have been brought. 28 U.S.C. § 1406(a). Here,
6 Plaintiff could have brought this action in the Southern District
7 of Texas. Frontier's principal place of business is there, and
8 Alaris concedes that jurisdiction over it is also proper there.
9 Accordingly, this action will be transferred to the United States
10 District Court for the Southern District of Texas.

11 CONCLUSION

12 Based on the foregoing, venue is not proper in the Northern
13 District of California. The Court, however, denies Defendants'
14 motion to dismiss, because dismissal would not be in the interest
15 of justice. Instead, the Court transfers this action to the
16 Southern District of Texas pursuant to 28 U.S.C. § 1406(a). The
17 Clerk shall transfer the file.

18 IT IS SO ORDERED.

19 Dated: 4/17/09



20 CLAUDIA WILKEN
21 United States District Judge
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